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EXAMINER

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RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SEAN THOMAS CLARK, DEREK KEITH FRIEDMAN,
and TAMARA ANN CAHILL

Appeal 2007-2594
Application 10/687,130
Technology Center 3700

Oral Hearing Held: January 23, 2008

Before WILLIAM F. PATE, III, HUBERT C. LORIN, and ANTON W. FETTING, Administrative Patent Judges

ON BEHALF OF THE APPELLANT:

MATTHEW FITZPATRICK
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The above-entitled matter came on for hearing on Wednesday, January 23, 2008, commencing at 10:15 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Ashorethea Cleveland, Notary Public.

PROCEEDINGS

JUDGE PATE: Good morning, Mr. Fitzpatrick.

MR. FITZPATRICK: Good morning, Your Honor.

JUDGE PATE: We have had the chance to go over this already. So, we are up to speed on it. So, you can start your argument with that in mind.

MR. FITZPATRICK: Thank you, Your Honor. Since you're familiar with the nature of the invention, I will get right into the Examiner's rejections.

This final action has both novelty rejections and obviousness rejections; and while anticipation is a question of fact, I don't believe there is a dispute here on the facts of the references and in particular the Gibson reference.

I believe that the Examiner and the applicant agree regarding the fact-findings as far as what the references teach.

(Phone ringing.)

JUDGE PATE: Let's pause for a minute.

(Pause off record.)

JUDGE PATE: Okay. We're sorry about that, Mr. Fitzpatrick. Go ahead.

MR. FITZPATRICK: Okay. Thank you.

Your Honor, I think the issue stems from a dispute between the applicant and Examiner over the claim construction and therefore based on

1 that claim construction the manner in which the Gibson reference is applied
2 to the claims.

3 JUDGE PATE: Yes. We were interested in the claim construction,
4 too.

5 MR. FITZPATRICK: Okay. Well, specifically, I think the dispute is
6 over the total simulation and the totals in the claim that surround the actually
7 word simulation.

8 As I understand the final action, the Examiner is taking the position
9 that Gibson, for example, discloses a simulation because while groups of
10 children can play in the fire truck structure disclosed, that action of, say,
11 manipulating the steering wheel would provide a simulation to an adult if the
12 adult were also to manipulate the steering wheel and the simulation would
13 meet the limits of the claims that the adults be directly provided a
14 demonstration of an event and activity and then that demonstration
15 assimilate the experience of a child in a given stage of development.

16 The issue with that claim construction in my view is that it's not a
17 reasonable claim construction. It in no way limits the meaning of the word
18 "simulation."

19 It's both contrary to the ordinary meaning of the word, the dictionary
20 definition of the word, and it's contrary to the examples and the manner in
21 which the word is used in the specification.

22 For that matter, it's also contrary to the manner in which the word is
23 used in the very reference being applied.

24 Gibson itself uses the term "simulation." It's in column four, about the
25 36th down where Gibson discloses that a critical feature of the present

1 invention is to provide a structure simulating an actual item, such as a fire
2 truck, a boat, a train.

3 So, I think that all the evidence of record, including the dictionary
4 definition, the ordinary meaning of the word, the manner in which the word
5 is used in the specification, carries with it the sense that simulation must
6 somehow mimic the operating of another system. One thing acts as a proxy
7 for something else.

8 To say that me closing a door simulates somebody else closing a door
9 really deprives the word of meaning, and most any physical object would
10 meet that definition without this representation notion that comes from the
11 very definition of the word.

12 I think in this regard this fact scenario is very similar to what the
13 federal circuit faced in the Velon case where the claim term addition was
14 adjustable; and in fact, in that situation there was really no dispute that the
15 accused infringer literally had a product that was adjustable. Taking the
16 term of capable of being adjusted, that definition was likely met. But the
17 court said, where you deprived the word of meaning so as to not really limit
18 the term from any physical structure that that's an incorrect construction.

19 I think that case is even more clearly met here where, as I understand
20 it, the object does not behave any differently when any user uses it. There's
21 no representation capacity. There's no ability to get an appreciation for how
22 some other system works.

23 JUDGE LORIN: Counsel, I have a few questions. This concept of
24 adjustability is very different, I think, than what you have here. This is an
25 apparatus claim.

26 MR. FITZPATRICK: Yes.

1 JUDGE LORIN: So, when I read this safety element D, where you
2 have a three-dimensional interactive aide, would you agree the reference
3 teaches -- the reference has a three-dimensional --

4 MR. FITZPATRICK: I would certainly agree that under the
5 expressed definitions provided in the application that the reference does
6 show a structure which is indeed three-dimensional and it would meet the
7 definition of interactive as that term is used in the application.

8 JUDGE LORIN: Okay. Then the element goes on to say, "provided
9 directly to said user a demonstration of an event or an activity." Do you
10 agree that the three-dimensional aide in the reference when used by an adult
11 user provided that user a demonstration?

12 MR. FITZPATRICK: Yes. As far as that goes, yes. If an adult were
13 to turn the steering wheel of the Gibson truck, I believe that would be a
14 demonstration within the meaning of those claims.

15 JUDGE LORIN: So, that element of the apparatus has all the
16 structure that your claim would require that aide to have?

17 MR. FITZPATRICK: No. I disagree, Your Honor. The functionality
18 of the structure, of the claimed three-dimensional interactive aide -- it must
19 do something; and in particular, it must provide the simulation. And the
20 specification provides about seven to 12 examples of things that do that.

21 So, I don't believe it's right to say that it is merely a three-dimensional
22 structure that can be used. It's a three-dimensional structure that does
23 something in particular and what it does affects its structure; and there's all
24 kinds of examples of structures in the specification, and I think that's the
25 crux of the dispute.

1 JUDGE LORIN: It is the crux of the dispute. I understand. I read the
2 specification. We understand what you're driving at. But the Examiner is
3 looking at this claim very broadly and sees a three-dimensional aide that has
4 to have a structure that simulates.

5 What is the difference between an object that has a structure and an
6 object that has a structure that simulates? What is structurally different
7 about the two? Isn't this a matter of perception? Is this a matter of what one
8 sees?

9 MR. FITZPATRICK: I disagree. It's certainly required for the
10 Examiner to construe these claims as broadly as reasonably allowable but I
11 don't think that this construction is a reasonable one based on the meaning of
12 these terms.

13 I believe that by limiting the structures to structures which do these
14 things, that term defines a class of structures, and not every physical object
15 in the world falls within that class, and unless and until the Examiner comes
16 forward with prior art where there are such structures that fall within the
17 claimed class, I don't believe it's a matter of perception and I don't believe
18 that the potential threat of how many structures are within that class is really
19 the issue.

20 JUDGE LORIN: Well, then let me ask you this, counsel: Looking at
21 Gibson here, this fire truck with these stages, teaching stages, what is
22 different about this and one that simulates the experience an adult would
23 have interacting with this object? What is the difference structurally?

24 MR. FITZPATRICK: Well, Your Honor, the use by a child to get a
25 simulation of what an adult driver might experience is not the claim
26 language. The claim language is, when an aide is used by an adult, the adult

1 is directly provided a simulation of the experience of a child in a particular
2 stage of development and therefore what is required is some transformation
3 of the activity or event that corresponds to a child's stage of development.
4 So, it could mimic a child's more incompletely developed vision or more
5 incompletely developed muscle coordination or things of this nature.

6 But to look at it the other way, a child may be getting some aspect of
7 what an adult might experience, is not the claim language, and we have
8 never argued that that's within the scope of this claim.

9 JUDGE LORIN: I understand your argument to be this: This is what
10 a child would experience if they played with this object.

11 MR. FITZPATRICK: Yes.

12 JUDGE LORIN: This is not what an adult would experience were
13 this to be in the proportion. If the adult were in the proportion of a child to
14 the object, it wouldn't be this object.

15 MR. FITZPATRICK: I think our position is actually more precise
16 than that. That object when used by an adult would not provide to the adult
17 any information, any demonstration or simulation regarding the experience a
18 child would have trying to perform a similar task other than merely
19 imagining it or other than using an ordinary object in an ordinary way in
20 which it was designed to be used; and in that situation, the terms in no way
21 limit it.

22 JUDGE LORIN: I understand what you're saying but I think you're
23 driving at a method. You're driving at the interaction between this and the
24 person. We're dealing with the object. We're dealing with structural
25 characteristics of this object.

1 MR. FITZPATRICK: And part of that structure according to the
2 claims when read in light of the specification -- part of that structure requires
3 that the object do something.

4 JUDGE LORIN: But if you don't change this at all and you make a
5 distinction between what this does, depending on who's using it, why does
6 that matter? The structure is exactly the same.

7 MR. FITZPATRICK: I understand that. Maybe I'm not making my
8 point very well. Regardless of who uses that, that will always behave in the
9 same way and the response will not be tailored towards representing what a
10 different person would experience.

11 The claim structures provide to an adult some simulation of the
12 experience of a child and therefore there must be some response of the
13 object. It must be designed in a way that the object responds in the manner
14 that a child in a given stage of development would experience that event or
15 that activity.

16 Probably the simplest example in the specification is -- I believe it's
17 on page eleven. It's the touch pads, where there could be, for example, two
18 pieces of something like a carpet. One is a normal sample where an adult
19 would feel this normally and the other is a modified texture which would
20 simulate how a child would experience that texture; and there, merely
21 touching the ordinary carpet in no way simulates the experience of a child in
22 a given stage of development. It's just ordinary use of the object and the
23 term simulation would have no meaning.

24 I don't believe it's correct to say that term simulation is merely
25 aspirational and not a structural limitation. It's a definition. It's a way to

1 describe a class of structures, a whole number of structures which do this
2 particular thing.

3 I don't have a better word that captures this class but ordinary objects
4 used in their ordinary way would not fall within this class.

5 JUDGE LORIN: Okay. I understand your position. The arguments
6 I've just been using are the ones the Examiner made. But let me see if I can
7 approach it a different way.

8 You don't define in your specification simulation or experience; is that
9 accurate?

10 MR. FITZPATRICK: I don't believe there's an expressed definition
11 of those terms, per se; but I would say that certainly by implication and by
12 the examples, there is definition of those terms, and to the extent that they're
13 ordinary words with numerous examples that go with them, I believe they
14 are defined but perhaps not expressly.

15 JUDGE LORIN: Okay. What I'm leading to is, your apparatus you
16 say is structurally different because of the experience an adult would have
17 was going to that of a child. For that argument to be persuasive the premise
18 has to be that the adult and the child had different experiences.

19 MR. FITZPATRICK: I believe that's correct. Yes. I think that's the
20 point of the invention, is to teach adults, to give adults some learning that
21 children in different stages of development do in fact see and feel the world
22 differently than adults do.

23 JUDGE LORIN: Do they really?

24 MR. FITZPATRICK: Yes.

25 JUDGE LORIN: When a child picks up a ball and throws it, is it any
26 different than my experience of picking up a ball and throwing it?

1 MR. FITZPATRICK: At some level of abstraction, I suppose it's not.
2 Gravity is gravity and there are certain basic mechanics that would be
3 similar; but I think it is accurate that the muscle development of children is
4 different and the perceived difficulty of the task would be different and the
5 proportions of it. I think there are a lot of aspects of doing that that would in
6 fact be different for a child. Simply by watching a child, it would be a
7 challenge for an adult to really appreciate that. So, trying to bring that to
8 light really is the point of the invention.

9 JUDGE LORIN: Well, all adults have been children.

10 MR. FITZPATRICK: Yes.

11 JUDGE LORIN: We all understand what children go through having
12 been children ourselves. What you're asking here is a distinction in
13 structural differences based on the simulation of experiences. A child's
14 experience throwing the ball physically may be different but is the
15 experience any different?

16 MR. FITZPATRICK: I'm --

17 JUDGE LORIN: This is not an argument the Examiner raised. The
18 difficulty is the way you're presenting this claim which is an apparatus
19 claim.

20 MR. FITZPATRICK: Yes.

21 JUDGE LORIN: And you're making a distinction that there is a
22 difference characteristically, structurally, of this apparatus based on the
23 simulation of an experience; and you're asking us to look at a structurally
24 difference between this fire truck and a truck that you would encompass
25 because of the simulation of the experience but you're unable to explain to
26 me the difference between a child would have with this and an adult.

1 MR. FITZPATRICK: The claim is not directed to structures which
2 behave differently for children and adults. The claim is directed to
3 structures that when used somehow represent the experience of a child. So,
4 that structure I believe would do exactly the same thing when a child uses it
5 and when an adult uses it.

6 JUDGE LORIN: Well, going back to the premise, the premise is that
7 there's a difference between a child's experience and an adult's experience.

8 MR. FITZPATRICK: Yes.

9 JUDGE LORIN: Right.

10 MR. FITZPATRICK: And that premise is the --

11 JUDGE LORIN: Is what I'm challenging.

12 MR. FITZPATRICK: Well, it's the basic of the invention. The
13 wobble board is another example of such a structure. It would not really
14 behave differently for an adult or a child but an adult would have presented
15 to him or to her the claim simulation. The structure is that board; and the
16 term here encompasses a class of structures.

17 I don't think the claim requires that a given object behave differently
18 for an adult or for a child. That language is not in the claim. But the word
19 "simulation" does require that the object perform in some representational
20 way. That's how the term "simulator" is consistently used; and it is the
21 premise of the invention that there are differences between how children
22 undergo physical activities and how adults do.

23 But the issue I have with the rejections on these references is that
24 there's no transformation at all. They're ordinary objects that don't behave
25 any differently.

26 JUDGE LORIN: Thank you, counsel.

1 MR. FITZPATRICK: If there are no further questions from the panel,

2 I --

3 JUDGE PATE: Okay. I don't think we have any further questions.

4 You've done a real good job arguing this. It's tough one. It's a very abstract
5 claim.

6 MR. FITZPATRICK: Thank you, Your Honor.

7 JUDGE PATE: Okay.

8 (Whereupon, at approximately 10:35 a.m., the proceedings were concluded.)